Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

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NO. 76-5881

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ALICIA MORALES, et al.,

Petitioners,

V.

JAMES TURMAN, et al.,

Respondents.

* * *

RESPONSE TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 535 F.2d 864 and review of that opinion is sought.

Opinions of the United States District Court for the Eastern District of Texas are reported at 59 F.R.D. 157, 326 F.Supp. 677, 364 F.Supp. 166 and 383 F.Supp. 53.

JURISDICTION

Petitioners seek to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1254.

QUESTION PRESENTED

Was the United States Court of Appeals for the Fifth Circuit correct in holding that the single judge District Court was without jurisdiction to decide the issues involved in this litigation and grant the type of relief ordered and in remanding this cause to the District Court to be heard by a three-judge panel?

STATEMENT

Petitioners in this lawsuit have been defined as all minor children who are presently, have been in the past, or may be in the future, adjudicated delinquent and involuntarily committed to the custody of the Texas Youth Council. Respondents in this lawsuit are Dr. James Turman, formerly Executive Director of the Texas Youth Council, the Board of the Texas Youth Council, none of whom were serving at the time the lawsuit was filed or tried (all of whom serve without salary and were appointed by the Governor of Texas with the consent of the Texas Senate and only one of which was on the Board during trial), and various employees of the Texas Youth Council responsible for the supervision of juveniles committed to the Texas Youth Council and its custody.

During the two years following the original filing of this lawsuit, on February 12, 1971, this action was greatly expanded by Petitioners from its original purpose of testing attorney-client relationships for youths within the Texas Youth Council to a comprehensive test of a wide range of alleged constitutional rights involving the First, Fourth, Fifth, Sixth, Eighth, Eleventh and Fourteenth Amendments to the United States Constitution.

Prior to trial in 1973, the District Court entered two orders, one (326 F.Supp. 677) guaranteeing juveniles within the Texas Youth Council the right to private consultation with attorneys and the other, a comprehensive order entered on December 27, 1972, calling for widespread due process protections in the commitment procedures and in the adjudication and disposition of delinquent youth in Texas.

A trial date was set on the merits of this litigation in the summer of 1973. At a pretrial conference with all parties present, held shortly before the trial, Petitioners defined and listed the issues in the lawsuit to be a broad spectrum of alleged constitutional rights including traditional protections

asserted under the various amendments to the United States Constitution and ranging to a theoretical "right to treatment." Respondents asked for and were denied the empaneling of a three-judge federal panel (pursuant to 28 U.S.C. §2281) immediately preceding trial on the merits. A trial, lasting six weeks before Judge William Wayne Justice, United States District Judge, Eastern District of Texas, followed this pretrial conference.

Shortly after the conclusion of the trial of this lawsuit, the district court, on August 31, 1973, issued an Emergency Interim Relief Order in which permanent injunctive relief on some matters and general protections for Petitioners were specifically delineated. Morales v. Turman, 364 F.Supp. 166 (E.D. Tex. 1973). Subsequent attempts on the part of Respondents to have this order clarified or modified were denied by the district court.

On August 30, 1974, more than one full year after the trial of this lawsuit, the district court entered its Memorandum Opinion and Order from which appeal was taken. The opinion is reported at 383 F.Supp. 53. Respondents filed their Notice of Appeal on September 9, 1974. Pursuant to Rule 8, Federal Rules of Appellate Procedure, Respondents filed a motion to stay pending appeal in the district court, which was denied in a written order on September 18, 1974. On the same date the district court denied a motion pursuant to Title 28 U.S.C. §1292(b) requesting certification of controlling questions of law on which there were substantial grounds for difference of opinion.

An appeal to the United States Court of Appeals for the Fifth Circuit followed and the opinion of that Court remanding this cause to the district court was issued on July 21, 1976 (535 F.Supp. 864). Petitioners' herein, Appellees below, filed a motion for rehearing which was denied on September 17, 1976. Pursuant to Rule 41, Federal Rules of Appellate Procedure, the mandate was issued on September 24, 1976.

DISCUSSION

1. Overview

The only federal court which had jurisdiction to consider the issues raised by Petitioners in this case was a three-judge district court. This contention was presented to the district court prior to trial and was rejected, the district court ruling that Petitioners did not seek to enjoin enforcement of any state statute and that the Texas Youth Council policies which they did seek to enjoin were either undiscoverable or of local application only; accordingly, the district court ruled that a three-judge panel was not required. In this respect, as recognized by the circuit court, the district court grievously erred.

An examination of the contentions made by Petitioners, particularly as they were characterized in the pretrial order filed in this case, reveals that Petitioners mounted a massive constitutional attack on the programs and policies of the Texas Youth Council,[1] programs and policies which have implicitly approved in the appropriation bills enacted by the Texas

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1/ Petitioners' framing of the issues in the pretrial order could not be more clearly stated and are ample evidence of the thrust of this litigation. Those issues, as stated by Petitioners, were:

(1) Whether there is a federal constitutional right of youths committed to the Texas Youth Council to freedom of speech and expression, freedom of association, freedom of religious choice, to petition for redress of grievances and to enjoy a right to privacy under the First Amendment as incorporated into the Fourteenth Amendment of the United States Constitution, and whether, if such a right exists, that right has been violated by the rules, regulations, practices and policies of the TYC.

(2) Whether there is a federal constitutional right of youths committed to the TYC to be secure in their persons and property from unreasonable searches and seizures as guaranteed by the Fourth Amendment incorporated into the Fourteenth Amendment of the United States Constitution and whether, if such a right exists, that right has been violated by the rules, regulations, practices and policies of the TYC.

(3) Whether the federal constitutional rights of youths committed to the TYC to be protected from cruel and unusual punishment as guaranteed by the

1/ (Continued)

Eighth Amendment incorporated into the Fourteenth Amendment of the United States Constitution has been violated by the rules, regulations, practices and policies by the TYC.

(4) Whether there is a federal constitutional right of youths committed to the TYC to privacy as guaranteed by the First, Fourth, Fifth and Ninth Amendments incorporated into the Fourteenth Amendment of the United States Constitution, and whether, if such a right exists, that right has been violated by the rules, regulations, practices and policies of the TYC.

(5) Whether there is a federal constitutional and/or statutory right of youths committed to the TYC to be free from involuntary servitude under the Thirteenth Amendment to the United States Constitution and to be free from any obligation to perform work tasks involving the operation or maintenance of TYC institutions, and whether, if such rights exist, those rights have been violated by the rules, regulations, practices and policies of the TYC.

(6) Whether there is a right of particular youths committed to the TYC to equal protection of the laws guaranteed by the Fourteenth Amendment within the class of all youths committed to the TYC for delinquency; and as between classes of youths committed to the TYC for delinquency and adults fined or imprisoned for the same offenses, and if such right exists, whether it has been violated by the rules, regulations, practices and policies of the TYC.

(7) Whether there is a federal constitutional right of youths committed to the TYC as a result of juvenile court adjudications to receive rehabilitative treatment and whether that treatment must be administered in a manner that is least restrictive of the liberty of the youth as guaranteed by the due process clause of the Fourteenth Amendment to the United States Constitution and whether if such rights exist, they have been violated by the rules, regulations, practices and policies of the TYC.

(8) Whether there is a federal constitutional right of youths committed to TYC not to be disciplined while institutionalized, arbitrarily transferred between institutions or groupings, and have their parole revoked without due process of law, as required by the Fourteenth Amendment to the United States Constitution, and if such a right exists, whether that right has been violated by the rules, regulations, practices and policies of the TYC.

(9) Whether each youth committed to the TYC is receiving his or her statutory rights to "such care, guidance and control, preferably in (his) own home, as will serve the child's welfare . . . (such) custody, care, and discipline as nearly as possible equivalent to that which should have been given him by his parents." Vernon's Tex. Stat. Ann. 2388-1 and 5143(d).

(10) Whether the failure, if any, of TYC to fulfill its statutory obligation to provide equivalent care

Legislature and which have been implemented at Texas Youth Council institutions throughout the state. In effect, the thrust of Petitioners' case was that Texas' program for dealing with delinquent youth, both as created by the Legislature and as implemented by the Texas Youth Council, was constitutionally deficient standing alone. It was clear from the outset of this litigation that if it were to uphold the constitutional claims made by Petitioners, the district court would have to insist that new policies be instituted by the Texas Youth Council and to enjoin further enforcement of present statewide practices. This is exactly the kind of relief that was exclusively reserved by statute for district courts of three judges. Therefore, neither the district court below nor the circuit court had jurisdiction in this case, and it had to be and was remanded so that a three-judge panel could be convened pursuant to 28 U.S.C. §2281.

Congress enacted the three-judge court act, apparently believing that there would be less public resentment if enforcement of a state statute was halted by three judges rather than one. See Wright, Law of the Federal Courts, §50, The Three-Judge Court Act (2nd Ed. 1970). Thus the purpose of the Act was to provide procedural protection against improvident statewide doom by a single federal district judge of a state's legislative policy. While such protection may no longer be necessary and while the achievement of it may even have imposed undue burdens on the federal system, Congress had, nevertheless, not yet been persuaded to repeal or modify the three-judge court provisions prior to August, 1976.

28 U.S.C. §2281 provided:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining

1/ (Continued)

> "to that which should have been given him by his parents" and other statutory obligation to each youth committed to its custody violated that youth's federal constitutional right to due process under the Fourteenth Amendment.

> the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

While §2281 was written in seemingly simple language, it has not been simple to apply. For various reasons, the courts created a very complex set of rules to be used in determining whether a three-judge court is required in a particular case. See Currie, The Three-Judge Court in Constitutional Litigation, 32 U.Chi.L.Rev.1 (1964).

One of these rules which is particularly relevant to the instant case is that §2281 is a jurisdictional statute. Sands v. Wainwright, 491 F.2d 417 (5th Cir. 1973). When a case was one which fell within the jurisdiction of a three-judge court, neither a single judge district court nor a circuit court of appeals had jurisdiction to entertain it. An appellate court such as the Fifth Circuit must, even on its own motion, have remanded a case for trial by three judges if it determines that a single judge should not have heard the case. See, e.g., Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). In this case, appellants did request the district court to convene a three-judge panel, but this request was denied.

A second principle which emerged from the litigation concerning three-judge courts was that a three-judge court need not be convened when either the constitutional attack mounted by plaintiffs was unsubstantial, Ex Parte Poresky, 290 U.S. 30 (1933) or the constitutional defense offered by defendants was frivolous, Bailey v. Patterson, 369 U.S. 31 (1962). A claim was insubstantial only if its unsoundness so clearly resulted from the previous court decisions as to foreclose the subject and leave no room for the inference that the question sought to be raised could be the subject of controversy. Ex Parte Poresky, supra at 32. One of the major issues in this

lawsuit was the extent of the rehabilitative treatment to which juvenile delinquents are constitutionally entitled when placed in the custody of the Texas Youth Council. There can be no doubt that this issue along with several others in this case was substantial, and neither the district court nor Petitioners have suggested otherwise.

A third pripciple arising from three-judge court litigation was that such a court is required only when injunctive relief was sought. When declaratory relief and nothing more was requested, the three-judge court procedure need not have been invoked. Kennedy v. Mendoza-Martinez, supra and Nieves v. Oswald, 477 F.2d 1109 (2nd Cir. 1973). Petitioners in this case did request injunctive relief in the third cause of action of their amended complaint, and the district court acknowledged this fact.

A final principle bearing on the applicability of the three-judge court provisions was that a three-judge court was required only when a "State statute . . . or order by an administrative board or commission acting under State statutes" was subjected to constitutional attack. The quoted language has been interpreted rather broadly. In Phillips v. United States, 312 U.S. 246 (1941), this Court stated that the three-judge court procedure is brought into play whenever a plaintiff "seeks to interpose the Constitution against enforcement of a state policy, whether such policy is defined in a State Constitution or in an ordinary statute or through the delegated legislation of an administrative board or commission." 312 U.S. at 251. In American Federation of Labor v. Watson, 327 U.S. 582 (1946), the court amplified its pronouncement in Phillips as follows:

> "In our view the word 'statute' in [the three-judge court provision] is a compendious summary of various enactments, by whatever method they may be adopted, to which a State gives her sanction . . ." 327 U.S. at 592-93.

These cases led the federal appellate courts to hold that a three-judge tribunal is required whenever a state's programs

or policies, no matter how expressed, were challenged as unconstitutional and injunctive relief against them was sought.

For instance, in Nieves v. Oswald, supra, the Second Circuit held that a challenge to prison regulations "sufficiently implicates well-considered state policy of statewide application to require three-judge court adjudication of the claim for injunctive relief." 477 F.2d at 1114. The recent Fifth Circuit decision in Sands v. Wainwright, supra, illustrates the point even better. In one of the cases considered by the Fifth Circuit in Sands-Baker v. Estelle, No. 72-2471, the plaintiffs were challenging the disciplinary procedures of the Texas Department of Corrections and its practice of reading and censoring certain inmate correspondence. Plaintiffs very carefully refrained from challenging any state statutes or written Department of Corrections regulations; instead they emphatically pointed out that they only challenged certain "practices" of the Department of Corrections. They argued that as applied to them the "practices" were unconstitutional and that other policies would have to be adopted in order to assure them certain constitutional rights. The Fifth Circuit nevertheless held that the suit did involve a challenge to state policies, as expressed in the practices of the state's prison system, and that consequently a three-judge court was required.

It is now clear, then, that whatever the programs or policies of a state were challenged as unconstitutional and an injunction against the continued implementation of them was sought, §2281 required a three-judge court to be convened. So long as the program or policy was truly of statewide significance, Board of Regents v. New Left Education Project, 404 U.S. 541 (1972), it does not matter how the state chose to give expression to that program or policy. Whether the policy be found in the form of a statute, a regulation, or a mere practice of a state agency, a constitutional challenge to it had to be heard by a court of three judges.

Petitioners implications to the contrary notwithstanding, 28 U.S.C. §2281 is fully applicable to this litigation (as are the rules developad with respect to §2281 discussed above). It is true that §2281 is no longer the law. Public Law 94-381 was enacted and did, effectively, repeal §2281. However, as recognized by Petitioners, Congress left no question that litigation ongoing at the time of the enactment of Public Law 94-381 was to be in no way effected by the repeal. Section 7 of Public Law 94-381, makes it indisputably clear that this cause is in no way effected by that law and any lengthy discussion of the repealing statute is, therefore, irrelevant.[2/]

Finally, Petitioners' attempt to equate the number of pending §1983 cases in federal courts and specifically in the Fifth Circuit to the number of three judge-court cases to be heard in the future is patently specious. This Court is sufficiently knowledgeable of the particular individualized nature of almost all §1983 complaints to realize that their resolution in nearly all cases will come about without the need for three-judge consideration. In addition, the opinion of the Circuit Court in this cause in no way makes §2281 applicable to all §1983 cases.

2. Court of Appeals

The Court of Appeals, in considering this cause of action, correctly concluded that "[t]o hold that no three-judge court is required because plaintiffs were seeking to effectuate rather than challenge state policy would be to ignore the obvious thrust of their complaint." Morales v. Turman, 535 F.2d 864, 870 (1976). Indeed it is unmistakably evident from the pleadings, the pretrial order, and requested relief of Petitioners, coupled with the lengthy opinion of the district

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2/ It is suggested that Petitioners' "resolution" of this matter with an interpretation of the word "commenced" as used in Section 7 as meaning ongoing before a three-judge panel is silly to say the least. A litigant who has tried for years to get the proper court to hear his case should not be disallowed that opportunity just because of passage of time.

Additionally, it is suggested that the proper definition of the word "commenced" is found in Rule 3, Federal Rules of Civil Procedure.

court, that the thrust and purpose of this litigation was to completely restructure the entire system of programs and facilities operated by the Texas Youth Council. Few, if any, parts of the Texas system escaped attack.

The Fifth Circuit properly analyzed that the word "statute" as found in §2281 "'is a compendious summary of various enactments, by whatever method they may be adopted, to which a state gives her sanction . . .' American Federation of Labor v. Watson, 327 U.S. 582 . . ." Id., at 870. Similarly, the Fifth Circuit properly concluded that Petitioners had attacked practices and policies which comprised Texas' statewide program for dealing with juvenile delinquents,[3/] and that carefully explained the critical difference between the instant cause and Leonard v. Mississippi, 509 F.2d 820 (5th Cir. 1975), cert. den., 423 U.S. 998 (1976). 535 F.2d 864, 871.

The decision in Baker v. Estelle, 491 F.2d 417 (5th Cir. 1973) is, indeed, a basis upon which the appellate court correctly decided this issue. See specifically 491 F.2d 417, 428. While Petitioners argue that the so-called expansion of three-judge court applicability make it impossible for the litigant to know whether such a panel is needed or not, that supposed difficulty should not be applicable to the present case. In litigation such as Baker or Morales, where a system-wide attack is leveled, plaintiffs were certainly responsible for realizing that such a wide-range assault would require the special court. However, as Petitioners do recognize that even if that was a problem, which it was not, it will not be a difficulty for those litigants filing after the repeal of §2281 in August, 1976. Furthermore, Petitioners, while recognizing the broad scope of the district court's order, argue that the appellate court's opinion leaves the matter in an

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3/ The matters recognized by the Fifth Circuit as being components in the statewide system include but are not limited to: (1) placement and classification policy, (2) solitary confinement and corporal punishment, (3) academic and vocational education, (4) staffing and hiring, (5) use of large rural institutions, (6) mail censorship, and (7) sexual segregation of students.

amorphous area where litigants will be forced to guess at the possible ramifications of the relief which might be framed. Such uncertainty on the part of Petitioners is at least peculiar since the district court was repeatedly deciding those issues raised in Petitioners' pleadings and statements of issues in the pretrial order. If litigants want to dismantle and restructure a statewide system and the action commenced prior to August, 1976, they should be on notice that a three-judge court is required.[4/] Neither Defendants below nor the Fifth Circuit framed the issues in this cause.

Petitioners are similarly off base in arguing that the Fifth Circuit opinion in Morales is in conflict with earlier decisions of this Court. Contrary to that assertion, the Fifth Circuit clearly made its decision based on the prior law of this Court. It was the "improvident statewide doom by a federal court of a state's legislative policy" as to how programs were to be operated and what funds were to be allocated to Texas' program for dealing with delinquent youth that prompted the Fifth Circuit decision. Phillips v. United States, 312 U.S. 246, 251, 61 S.Ct. 480, 483 (1941). In addition, repeated support for this position of extra protection for attacks on state policy is glaringly evident from this Court's writings. See Florida Lime and Avocado Growers v. Jacobsen, 362 U.S. 73, 80 S.Ct. 568 (1960); Query v. United States, 316 U.S. 486, 62 S.Ct. 1122 (1942). In addition, Petitioners' attempt to read great conflict into the Fifth Circuit opinion and dictum found in Baxter v. Palmigiano, ____U.S.____, 96 S.Ct. 1551 (1976), must fail. As recognized by the Fifth Circuit, this Court in footnote 2 of Baxter, said no three-judge court was required because there was a policy vacuum.

4/ "It is one thing to permit the party for whose benefit an appeal is provided to lose the privilege by artless pleading; it is quite another to permit one party, by artful pleading, to avoid a procedural requirement designed for the protection of the other. The three-judge requirement was enacted to protect the states, not plaintiffs; if in substance the case is within the requirement, the statute should not be frustrated by a form of words." Currie, The Three-Judge District Court in Constitutional Litigation, 32 U.Chi.L.R. 1, 39 (1964).

The state had not decided to do anything one way or the other. That does not equate, as Petitioners content, with the instant litigation where the policy is identifiable (indeed it was identifiable enough for Petitioners to attack) but not yet formally codified.

The interpretations given §2281 by the Fifth Circuit in Sands v. Wainwright, 491 F.2d 417 (5th Cir. 1973) en banc, cert. den., sub nom., Guajardo v. Estelle, 416 U.S. 992, 94 S.Ct. 2403 (1974) and in the instant litigation are sound and are not the nefarious traps insinuated by Petitioners. As in Costello v. Wainwright, when Petitioners expanded this litigation to encompass the whole system, they put themselves under the ambit of §2281.[5/]

3. Conclusion

This Court should look not to what Petitioners now argue, but at what they clearly have done and have intended to do in this lawsuit. Petitioners framed the issues. Petitioners expanded the lawsuit. Petitioners sought to dismantle the system. To now argue that such an all inclusive attack is not the type requiring a three-judge court is incredible.

Equally as incredible is the attempt by Petitioners to escape this requirement by stating that it is unfair to them because they were not aware that such a court was necessary. That is no reason to ignore such a jurisdictional requirement.

Also, Petitioners insinuations that no three-judge court should now be required because Congress has repealed §2281 are specious. The wisdom of Congress' repeal of this requirement will be judged in the years to come, but it is unmistakable that present, ongoing litigation is exempted.

Finally, this Court should realize, as did the Fifth Circuit, that Petitioners are attempting to put form over substance. Irrespective of the form of Texas policy, the

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5/ "The district court decided that adequate health care could simply not be afforded to the prisoners because of the crowded conditions of the prison. When the action turned into a prison overcrowding case, the relief stretched beyond the legal limits of the defendants' authority." Costello v. Wainwright, 539 F.2d 547, 550 (1976).

substance of this lawsuit is an all out, across the board attack on those policies and an attempt to restructure statewide programs.

For the reasons stated herein, this Court is respectfully requested to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing instrument have been mailed by certified mail, return receipt requested, to Mr. Peter B. Sandmann, Youth Law Center, 693 Mission Street, 2nd Floor, San Francisco, California 94105, on this the _____ day of January, 1977.

DAVID M. KENDALL
First Assistant Attorney General